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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 596.

JOHN G. RUHLIN, JENNIE B. RUHLIN, et al.,
Petitioners,
v.
NEW YORK LIFE INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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OPINIONS BELOW.

The Circuit Court of Appeals wrote two opinions in this case. The first, which has not been reported, appears in the record at pages 25 to 31. The opinion after re-argument appears in the record at pages 39 to 43, and is reported in 93 F. (2d) 416. The opinion of the District Court appears in the record at pages 17 to 19.

STATEMENT OF THE CASE.

This is a suit in equity by a mutual life insurance company to cancel and eliminate from five policies issued by it the disability and double indemnity benefit provisions. The ground for the rescission is that the insured

falsely and fraudulently answered material questions in the application for each policy regarding his prior health and treatments by physicians (R. 5). The five policies involved are all ordinary life insurance policies, but each also contains on its front page a promise to pay double the face of the policy in case of accidental death of the insured and also a provision for payment of monthly income and waiver of premiums if the insured becomes totally and presumably permanently disabled (R. 8-9). What is meant by accidental death and by total and presumably permanent disability is defined on the second page of each policy, and detailed conditions are also set forth there affecting those benefits in various ways (R. 9-12).

The total premium includes specified amounts charged in respect of the disability and double indemnity benefits. For example, the policy which is printed in the record contains the following (R. 9):

> "(The above premium includes $5.20 for the Double Indemnity Benefit and $19.30 for the Disability Benefits.)"

Each policy also provides that the insured may discontinue the double indemnity or disability benefit or both on any anniversary of the policy and obtain a reduction in the premium equivalent to the amount charged for such benefits (R. 10-12). Thus, with reference to double indemnity each policy provides as follows (R. 10):

> "Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for the Double Indemnity Benefit."

Each policy also contains what is known as an incontestability clause reading as follows (R. 12):

> "This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

Two of the policies were issued on December 1, 1928, and the other three on July 7, 1930. The petitioner, John G. Ruhlin, is designated as the insured in each policy and the other four petitioners are the beneficiaries.

The respondent offers to refund, with interest, all premiums received by it on account of the disability and double indemnity benefits provided by the policies (R. 6). Said sum, amounting to $1,045.42, has been paid into the District Court by the respondent.

The petitioners are residents of Pennsylvania and the respondent is incorporated under the laws of the State of New York (R. 2).

The District Court, after hearing, granted a preliminary injunction restraining the petitioners from instituting or prosecuting any proceeding upon said policies or from assigning any rights thereunder or changing the beneficiary or beneficiaries thereof, pending the outcome of this case. The petitioners moved to dismiss the bill and to dissolve the restraining order. Those motions were overruled (R. 19). The petitioners appealed.

The Circuit Court of Appeals after re-argument affirmed the decree of the District Court in its entirety (R. 43). The Circuit Court of Appeals in both of its opinions agreed with the District Court that the incontestable clause quoted above did not bar the respondent from at-

tempting to prove that fraud had been perpetrated upon it in the procurement of the insurance and that the double indemnity and disability provisions of the policies should, therefore, be rescinded (R. 27-28, 40-41). At the first argument before the Circuit Court of Appeals, that Court was composed of Circuit Judges Davis and Thompson and District Judge Watson (R. 25). At the re-argument, the Circuit Court was composed of Circuit Judges Buffington, Davis and Thompson (R. 39).

The only question raised is whether the incontestable clause quoted above bars a contest of the disability and double indemnity provisions more than two years after the date of issue of the policies.

ARGUMENT.

SUMMARY.

The plain provisions of the policy should be given effect.

The disability and double indemnity benefits are specifically exempted from the operation of the incontestability clause. This is demonstrated by logic and reason and is supported by the weight of authority.

The petitioners' contention would deprive the exception to the incontestable clause for the provisions relating to disability and double indemnity benefits of any effect. The law requires every word in a contract to be given some effect, if at all possible.

I.

General Approach.

The petitioners rely upon the doctrine that in case of ambiguity an insurance policy is to be construed most strongly against the company which wrote it. Referring to this rule, this Court said in *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 492:

> "* * * but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings.
>
> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. *Imperial Fire Ins. Co. v. Coos County,* 151 U. S. 452, 462-463."

With specific reference to an incontestable clause in an insurance policy, this Court by Mr. Justice Cardozo, in *American Life Ins. Co. v. Stewart,* 300 U. S. 203, 215, uttered the following note of caution:

> "To make a contract incontestable after the lapse of a brief time is to confer upon its holder extraordinary privileges. We must be on our guard against turning them into weapons of oppression."

II.

Consideration Upon Reason.

The decisions of the Courts below are supported by both reason and authority. Since the decided cases are not all harmonious, however, the question will be considered first from the standpoint of principle and reason.

In the first place, it is to be noted that each policy here involved is severable in the sense that the disability and double indemnity features may be discontinued while the life feature remains in force. Thus the first policy here involved (No. 10,452,365), after stipulating how much the semi-annual premium shall be and when due, continues as follows (R. 9):

> "The above premium includes $5.20 for the Double Indemnity Benefit and $19.30 for the Disability Benefits."

Similar provisions are found in each of the other policies except that the amount varies, which of course is immaterial.

Furthermore, each policy entitles the insured on any anniversary of the policy to terminate either the double indemnity or disability benefits, or both. If the insured so elects, a corresponding reduction in the premium is

expressly required. The last paragraph of the provisions relating to double indemnity is as follows (R. 10):

> "Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for the Double Indemnity Benefit."

A corresponding provision is found in the last paragraph relating to total and permanent disability, and is as follows (R. 12):

> "Any premium due on or after the anniversary of the Policy on which the age of the Insured at nearest birthday is sixty, will be reduced by the amount of premium charged for Disability Benefits. Upon written request of the Insured on any anniversary of this Policy and upon return of this Policy for proper indorsement, the Company will terminate this provision and thereafter the premium shall be reduced by the amount charged for Disability Benefits."

The above quoted provisions clearly show that the insured himself may delete the double indemnity or disability benefits from the policy and yet leave the ordinary life insurance in force. Indeed, after the insured reaches the age of 60, the disability benefits can no longer be continued but are absolutely required to be eliminated from the coverage. These considerations conclusively prove that the policy is severable in the sense that the disability and double indemnity features may be terminated while the life feature is continued in force. There is therefore no reason why a court may not decree cancellation of the disability and double indemnity benefits even though the rest of the policy remains in force.

The meaning of the incontestable clause contained in each of the policies here involved is, we submit, clear and unambiguous. The plain intention is to take the provisions relating to disability and double indemnity benefits out of the operation of the incontestable clause. The petitioners' argument resolves itself to this, that the second exception in the incontestable clause (excepting the provisions and conditions relating to disability and double indemnity benefits) should apply only to facts which occur after the policy is issued, or, in other words, that the second exception is merely to enable the company to defend itself against claims growing out of risks which are not covered by the policy and were, therefore, not assumed by the insurer. Such a construction of the incontestable clause is untenable. The only purpose of an incontestable clause is to bar defenses which attack the *validity* of the contract. Obviously, an incontestable clause is not intended to enlarge the *coverage* of a policy, by precluding the company from defending against a claim which is based on a loss against which no insurance was purchased or undertaken. Consequently, no exception to the incontestable clause would be needed to enable the insurer to contest a claim for double indemnity on the ground that the death was not accidental or to contest a claim for disability benefits on the ground that the insured was not totally and presumably permanently disabled as required by the policy. For example, the double indemnity is expressly made payable only in the event of accidental death, and the double indemnity provision expressly stipulates "Double Indemnity shall not be payable if the Insured's death resulted from self-destruction" (R. 9). It is clear under this language that double the face of the policy would never become payable unless the insured met an accidental death, and would not be payable if he committed suicide, regardless of whether the death

occurred more or less than two years after the issuance of the policy. No exception to the incontestable clause is needed to reach that conclusion. Yet counsel for the petitioners contend that the contrary is true and that the sole and only purpose of the exception to the incontestable clause for the provisions and conditions relating to disability and double indemnity benefits is to enable the insurer to insist upon the contingencies actually occurring, such as accidental death, which must happen in any event in order to create or sustain the loss insured against. To give the incontestable clause the construction for which the petitioners are contending would therefore deprive the phrase "except as to provisions and conditions relating to Disability and Double Indemnity Benefits" of any effect. It is, of course, elementary that a contract is to be construed so as to give effect to all of its words and terms and not so as to render some of them nugatory and void: *2 Cooley's Briefs on Insurance,* 963.

The gist of the petitioners' argument is stated in their brief as follows (p. 6):

> "As drawn by the insurer, the exceptions to incontestability, contained in the clause, reserve the right to defend only for matters occurring subsequently to the issuance of the policy, such as nonpayment of premium and matters intending to show that a claim for double indemnity or disability benefits made under the policy does not come within the provisions and conditions relating to such benefits contained in the policy."

To test the soundness of the contention of the petitioners, let us begin by asking a few questions. If the second exception were not in the incontestability clause, could it be held that the company would be estopped, after two years from the date of issue of the policy, from raising any defense against a claim for disability bene-

fits or double indemnity? If the second exception were not in the incontestability clause, could it be held that the company was liable for disability benefits, without being given the opportunity to prove that the insured was not disabled? If the second exception were not in the incontestability clause, could it be held that the company was liable for double the face of the policy, without being given a chance to prove that the death was not accidental? Of course not. No exception in the incontestability clause is needed to permit the insurer to raise such defenses. To construe the second exception in the incontestability clause as contended for by the petitioners would nullify that exception and render it useless, but, as is abundantly established by the authority cited above, a policy of insurance like every other contract is to be construed so as to give every phrase or clause, if possible, some meaning and effect. The only way the second exception in the incontestability clause can be given effect is by applying it to defenses which would otherwise be barred by the incontestability clause, and not by the useless gesture of applying it to defenses which could be raised even if the second exception were not in the incontestability clause. Accordingly, the only way the second exception in the incontestability clause can be given effect is by applying it to defenses which result in a contest of the validity of the policy. That is the only kind of defense to which an incontestability clause is intended to apply, and therefore the exception in that clause is intended to apply to similar defenses, viz., those which attack the policy's validity. An incontestability clause was never intended to apply to defenses that might accrue or events that might happen after the policy was issued. The purpose of an incontestability clause is to give the insurer a limited time from the date of issue of the policy to investigate whether the insurance embraced within such incontesta-

bility clause is voidable for any reason. Obviously the insurer could not during such limited time learn of defenses that it might only acquire in the future by reason of subsequent events. Since, then, an incontestability clause applies only to defenses which existed when the policy issued, or which attack the validity of the contract, the exception to that clause could only apply to defenses of a similar character, such as fraud in the procurement of the insurance.

That an incontestability clause is not intended to apply to defenses that might accrue or events that might happen after the policy is issued, which do not contest the validity of the contract but go only to the denial of coverage, appears from a case cited by the petitioners themselves: *Mayer v. Prudential Ins. Co.,* 121 Pa. Superior Ct. 475, 184 A. 267. It is there said (p. 479):

> "The real purpose of an incontestable clause is to prevent any defense which may be raised by the insurance company against the validity of the policy, such as fraud, misrepresentation and condition of health arising in connection with the issuance of the policy; but as to such provisions and conditions as necessarily must relate to matters which arise after the issuance of a policy and which do not affect the validity of the policy itself, the incontestable clause has not been applied. In Brady v. Prudential Ins. Co., supra, at page 650, in an opinion by Justice Williams, the court said: 'The provision in the ninth clause (the incontestable clause) which was relied upon to show that the policy was incontestable did not amount to a confession of judgment. It did not deny to the company the right to defend against an action brought upon the policy, except in so far as the defense might rest on a denial of the validity of the policy itself. All other lines of defense remained

open to it.' In Hall v. Life Assn., 19 Pa. Superior Ct. 31; Collins v. Metropolitan Life Ins. Co., 27 Pa. Superior Ct. 353; Sargeant v. Insurance Co., 189 Pa. 341, 41 A. 351; Doll v. Prudential Ins. Co., 21 Pa. Superior Ct. 434; McCreighton v. American Catholic Union, 71 Pa. Superior Ct. 332; Ludwinska v. John Hancock Mutual Life Ins. Co., 317 Pa. 577, 178 A. 28; Robinson v. Metropolitan Life Ins. Co., 69 Pa. Superior Ct. 274; Starck v. Union C. L. Ins. Co., 134 Pa. 45, 19 A. 703, it was held that the incontestable clause does not apply to risks not assumed by the policy."

In their brief, the petitioners say (p. 6):

"The purpose of an incontestable clause in a life insurance policy is, concededly, to bar the defense of fraud in procuring the insurance after a certain period."

If the incontestability clause is intended only to cut off inquiry into the truth of the statements made by the assured in the application and to preclude any question concerning the original validity of the policy after the contestable period has expired, it is clear that the incontestability clause would not apply to the defenses of suicide, self-inflicted injury or absence of total and permanent disability. The exception in the incontestability clause can only be given effect by applying it to defenses which would but for that exception come within the incontestability clause. In brief, the petitioners while admitting that the incontestable clause applies only to matters which occurred *before* the policy was issued, seek to limit the exception in the incontestable clause to matters which occur *after* the policy is issued. The argument of those seeking a reversal of the Courts below is illogical on its face.

The petitioners confuse two entirely distinct things: one is the coverage or risks assumed by a policy; the other is that after a specified period the policy shall be incontestable for any reason involved in the issuance of the policy and going to its validity. That a policy may be free from contest as to its validity does not extend the coverage or risks insured against. Because a life insurance policy has become incontestable does not mean, for example, that the insurer is precluded from contesting a claim on the ground that the insured is not dead but still alive. The incontestable clause means that the company may not assert that the policy is not valid. The incontestable clause does not mean that the insurance company agrees to waive the right to defend itself against a risk which it has never contracted to assume. Were it otherwise, it could with equal logic be said that after the contestable period has expired a life insurance policy could be used to cover a loss of property by fire. Of course that conclusion is ridiculous. It serves, however, to contrast the difference between the coverage of a policy or risks assumed on the one hand and the effect of the incontestability clause on the other hand. This distinction has been recognized in *Mack v. Conn. General Life Ins. Co.*, 12 F. (2d) 416 (cert. den. 271 U. S. 687); *Sanders v. Jefferson S. Life Ins. Co.*, 10 F. (2d) 143; *Hearin v. Standard Life Ins. Co.*, 8 F. (2d) 202; *Mutual Life Ins. Co. v. Kelly*, 114 Fed. 268; *Starck v. Union Central Life Ins. Co.*, 134 Pa. 45, and *Hall v. Mutual Reserve Fund Life Asso.*, 19 Pa. Superior Ct. 31. In the first of the cases cited, the Circuit Court of Appeals for the Eighth Circuit held there could be no recovery under a policy which expressly excepted death by suicide even though the death occurred after the period specified in an incontestable clause in the policy, saying (p. 418):

> "The contract provision expressly excluding the assumption of the risk of suicide for two years is

> entirely distinct from the incontestable clause, is consistent with it, and the one in no way contradicts the other. There is a distinction between facts which would warrant a rescission of the contract and a risk not covered by the contract. The incontestable clause relates to the former. The suicide clause relates to the latter."

In the second of the cases just cited, the Circuit Court of Appeals for the Fifth Circuit said (p. 144):

> "A provision for incontestability does not have the effect of converting a promise to pay on the happening of a stated contingency into a promise to pay whether such contingency does or does not happen. It cannot properly be said that a party to an instrument contests it by raising the question whether under its terms a liability asserted by another party has or has not accrued. The maker of a promissory note payable one year after date would not contest it by resisting an attempt to enforce it before it was due."

In the last of the cases cited above, the court, in holding that the insurer was liable only for return of premiums where the insured committed suicide after the expiration of the contestable period, said (p. 35):

> "It (the incontestable clause) does not convert an exception of any risk into an assumption of it, or bar defense to a claim on a risk not assumed. It gives no warrant for reading into the contract a liability expressly excepted from it."

To the same effect Mr. Justice Cardozo when Chief Justice of the Court of Appeals of New York, in *Metropolitan Life Ins. Co. v. Conway,* 252 N. Y. 449, 169 N. E. 642, said (p. 452):

> "The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage, the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken. Like questions have arisen in other jurisdictions and in other courts of this State. There has been general concurrence with reference to the answer (" citing cases).

Conditions subsequent which forfeit a policy and render it void are seldom found in modern life insurance policies, and to the best of our knowledge there never were any such conditions in disability and double indemnity provisions. Certainly there are no such conditions in the disability and double indemnity provisions now before this Court.

So also the Supreme Court of Pennsylvania in *Elwood v. New England Mutual Life Ins. Co.*, 305 Pa. 505, 158 A. 257, held that there could be no recovery for disability resulting from self-inflicted injuries, even though the incontestable clause contained no exception whatever relative to the disability provisions and the injuries were not inflicted until after the contestable period had expired.

To deny that the insured is dead or that his death was not accidental or that he is not totally and permanently disabled, would not be contesting the policy. The validity of the policy would be admitted, and the only contest would be as to whether the facts showed that the loss insured against had been sustained. A reliance upon the terms of the contract does not contest its validity, but assumes it. Thus in *Sanders v. Jefferson Standard Life Ins. Co.*, 4 F. (2d) 555, the court said (p. 558):

"An incontestable clause in a policy of insurance providing for one of two or more benefits in case of death, accident, or disability cannot be construed to prohibit the company from showing the particular alternative or disconnected benefit which the insured is entitled to receive. The defendant is not contesting the policy by showing facts that determine which of separate, but not necessarily cumulative, provisions of the policy apply."

To the same effect is *Wright v. Phila. Life Ins. Co.*, 25 F. (2d) 514. A well considered case is *Myers v. Liberty Life Ins. Co.*, 124 Kan. 191, 257 Pac. 933, 55 A. L. R. 542, in which the Supreme Court of Kansas held that there could be a recovery for premiums only where the insured committed suicide after the expiration of the contestable period. The court, in reasoning to its conclusion, said (p. 194):

"Suppose that, under the heading 'General Provision,' the policy provided the company would pay double the face amount if death resulted from accident occurring within two years from the date of issue. Nobody would say such a provision rendered the policy ambiguous with respect to extent of liability, if the contingency occurred, and if in an action to recover on the policy the company should deny double liability on the ground the insured did not die as the result of accident, it could not be urged successfully that the company was contesting the policy."

The incontestability clause has been frequently characterized as a short statute of limitations, giving the insurer a limited period within which to investigate any grounds for questioning the validity of the policy: *Mack v. Conn. General Life Ins. Co., supra; Brady v. Prudential Ins. Co.*, 168 Pa. 645, 649; *Lawler v. Home Life Ins. Co.*, 59 Pa. Superior Ct. 409; *4 Amer. & Eng. Ann. Cases*

364. A statute of limitations necessarily can apply only to a past event. It may therefore apply to the time within which an insurer may contest a policy on the ground that its issuance was induced by false representations. But how could an insurer investigate whether the insured will commit suicide? How could it be told within two years of the issuance of a policy whether the insured might years later destroy or injure himself, or whether he at some equally remote future time might become totally disabled? Yet that is what the petitioners contend. They say it is solely to enable the insurer to raise such defenses as suicide, self-inflicted injury or absence of total and permanent disability after the contestable period has expired that the second exception is inserted in the incontestable clause. Manifestly that is not so, because the incontestability clause would not bar such defenses even without any such exception in it. The second exception in the incontestability clause was not inserted for nothing. It can only be given effect by applying it to what would otherwise be barred by the incontestability clause, viz., fraud in the procurement of the disability and double indemnity insurance.

In this connection, it is also not to be overlooked that the proviso under consideration to the incontestable clause begins as follows: "except as to provisions" relating to disability and double indemnity benefits. This language is as broad as any conceivable. The exception is not confined to some provisions only relating to disability and double indemnity benefits. The word "provisions" without any qualification or limitation naturally refers to and includes all and everything that pertains to the disability and double indemnity features. Even if the word "conditions" in the exception were construed to refer to what the petitioners contend, the word "provisions" is also present and must be given effect. The word "provisions," it is submitted, can only be given ef-

fect by excepting from the operation of the incontestable clause everything in the policy relating to disability and double indemnity benefits, including the basic covenants to pay such benefits contained on the front page of each policy.

The petitioners argue that the words "provisions" and "conditions" are to be treated as synonymous. The contrary is shown, however, by the fact that the conjunction "and" connects those two words. If the word "conditions" were used as synonymous with "provisions," the phrase should read "except as to the provisions, or conditions, relating to Disability and Double Indemnity Benefits," or "except as to the provisions, the conditions, relating to Disability and Double Indemnity Benefits." Instead, the phrase reads "except as to provisions and conditions relating to Disability and Double Indemnity Benefits" (R. 12). The thought conveyed by the language actually used, therefore, is that the two words are not merely synonymous.

The fact that non-payment of premium is excepted from the incontestable clause does not, of course, mean that the other exception to the incontestable clause shall be confined to matters occurring in the future. The two exceptions are completely independent and distinct (R. 12). Even if the exception in the incontestability clause of the provisions relating to disability and double indemnity benefits might also be applied to events occurring after the issuance of the policy, such as death of the insured by suicide or in an airplane crash (the latter being also a risk specifically excepted from the double indemnity benefit), still that is no reason why that exception should not also be applied to events which occur before the issuance of the policy, in so far as they affect the disability and accidental death insurance. Further-

more, the first exception to the incontestable clause also applies to an event which must occur before the insurance goes into effect, namely, payment of the first premium. A provision in the application, which becomes a part of the contract, expressly stipulates "That the insurance hereby applied for shall not take effect unless and until * * * the first premium thereon (is) paid in full." This provision is omitted from the printed record.

Likewise, the second exception in the incontestable clause should not be limited to meeting the few cases, none of which is cited by the petitioners, and all of which but one are distinguishable or have been overruled, which the petitioners say hold "that the incontestable clause bars defenses for future occurrences." Even if the exception of the provisions relating to disability and double indemnity benefits could be used to meet those cases, which it never has been so far as we have been able to find, that exception could also with proper consistency be applied to events which had occurred before the policy was issued, in so far as those prior events affected the validity of the disability and double indemnity insurance. The plain import of the clause excepting the provisions relating to disability and double indemnity should not be restricted to something illogical when it is also applicable to prior events and logically is most pertinent to them. This argument of the petitioners was also rejected in *Equitable Life Assur. Soc. v. Deem,* 91 F. (2d) 569, 572, and in *Guardian Life Ins. Co. v. Barry,* 10 N. E. (2d) 614, 618 (Ind.), discussed hereinafter.*

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* Cases specifically deciding that risks not assumed by a policy will not be covered even after the expiration of the contestable period are: *Mack v. Conn. General Life Ins. Co., supra; Sanders v. Jefferson S. Life Ins. Co., supra; Hearin v. Standard Life Ins. Co., supra; Mutual Life Ins. Co. v. Kelly, supra; Starck v. Union Central Life Ins. Co., supra; Hall v. Mutual Reserve Fund Life Asso., supra; Metropolitan Life Ins. Co. v. Conway, supra; Elwood v. New England M. Life Ins. Co., supra;*

A fundamental error in the argument of the petitioners is that they assume that what appears on the second page of each policy consitutes the whole of the provisions and conditions relating to disability and double indemnity benefits, when in fact that is not so. Thus, in their brief, the petitioners immediately after quoting the incontestable clause say (pp. 4-5): "The provisions and conditions relative to 'Disability and Double Indemnity Benefits' in said policies provide they shall be payable upon receipt of proof, and, as relates to double indemnity, that the benefits shall be payable only if death resulted in a particular manner and not if it resulted from self destruction, etc., etc., and, as relates to disability benefits, that they shall be payable only if the insured is through injury or disease wholly prevented from performing any work, etc., * * *"

The petitioners completely ignore the main covenants to pay disability and double indemnity benefits, which appear on the first or front page of each policy (R. 8). The main provision concerning disability benefits is the promise of the company to pay 1% of the face of the policy monthly and to waive premiums if the insured becomes totally and presumably permanently disabled. Correspondingly, the main provision concerning the double indemnity benefit is the company's promise to pay double the face of the policy if the insured's death results from accident. These main provisions, which appear on the face of each policy, clearly are embraced within the meaning of the word "provisions" in the exception to the incontestable clause. The other provisions

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Wright v. Phila. Life Ins. Co., supra; Myers v. Liberty Life Ins. Co., supra; Flannagan v. Provident Life & A. Ins. Co., 22 F. (2d) 136 (C. C. A. 4); *Ferrand v. N. Y. Life Ins. Co.*, 69 F. (2d) 159 (C. C. A. 8) and *Howe v. N. Y. Life Ins. Co.*, 2 F. Supp. 242 (D. C. Cal.), and many other cases cited in them.

which the petitioners mention are merely the details which supplement the basic promises contained on the first page of the policy. There is manifestly not sufficient room on the face of a policy to set forth all of the detailed provisions and conditions which particularize the disability and double indemnity benefits. Obviously, that is no reason for limiting the provisions referred to in the incontestable clause to those which appear on the second page of the policy. The petitioners would have the exception in the incontestable clause read "except as to provisions and conditions contained on page two hereof relating to disability and double indemnity benefits." In fact, however, the words "contained on page two hereof" do not appear in the incontestable clause now before the Court. Nothing is in the incontestable clause to limit the provisions as to disability and double indemnity benefits which are excepted, and therefore *all* such provisions are removed from the operation of the incontestable clause.

The petitioners emphasize that "fraud in procuring the policy is not included" in what is set forth on the second page of each policy. How many times has any one ever seen a provision in a contract that it should be void if fraud was practiced in obtaining it? Not only would such a stipulation be extraordinary, but it would also be wholly unnecessary. The law itself renders every contract voidable for fraud in its inducement, without the help of any provision to that effect in the contract.

The legislatures of Pennsylvania and New York have used almost the same language as is found in the second exception to the incontestable clause now before this Court, viz., "provisions relative to disability and double indemnity benefits." The Pennsylvania insurance code of 1921, P. L. 682, § 410 (c), as last amended

by the Act of 1935, P. L. 1020, which requires an incontestable clause in every life policy, ends as follows:

> "provisions relative to benefits in the event of total and permanent disability, and provisions which grant additional insurance specifically against death by accident, may also be excepted."

The New York statute is identical (N. Y. Insurance Law § 101). Evidently the legislators thought that language was free from ambiguity.

Concluding this consideration of the question as one of novel impression, it is respectfully submitted that the incontestable clause applies only to the validity of the policy. Whether the death of the insured was accidental or whether he has become totally and permanently disabled so as to render the insurer liable for double indemnity or disability benefits, respectively, manifestly does not go to the validity of the policy. Accordingly no exception to the incontestable clause would be necessary to enable the insurer to contest whether the death was accidental or whether the insured is totally and permanently disabled. The only purpose and effect that can be given to the second exception in the incontestable clause is to permit the double indemnity and disability benefit provisions to be contested at any time on the ground of their validity because of fraud in the application for the insurance, even though the contestable period as to the ordinary life insurance feature of the policy has expired. At any rate, even if the incontestable clause is also applied to events which occur after the policy is issued, the exception of the disability and double indemnity benefits can and should extend to events which occurred before the policy was issued.

III.

Consideration Upon Precedent.

Passing to a review of the authorities on the subject, it will be found that the weight of them in numbers, and in soundness too, we submit, supports the decisions of the Courts below.

In *Stroehmann v. Mutual Life Ins. Co.*, 300 U. S. 435, this Court expressly recognized that the incontestable clause involved in the case at bar is different from that which is used by The Mutual Life Insurance Company. To that effect, this Court there said (p. 440):

> "The Circuit Court of Appeals followed its earlier opinion in *N. Y. Life Ins. Co. v. Gatti,* (Oct. 6, 1936), *where the company employed different language.* Certain life companies undertake to make exceptions to the Incontestability clause by words more precise than those now under consideration, and opinions in cases arising upon their policies must be appraised accordingly." (Italics added).

The opinion referred to in the foregoing excerpt as that in *New York Life Ins. Co. v. Gatti,* is the one which appears in the record in this case at pages 25 to 31. The *Gatti* case and the case at bar were companion cases in the District Court, and in the Circuit Court of Appeals until after the first opinion of the Circuit Court had been filed. Both cases involved the same questions and were disposed of together. Pending the re-argument, the insured in the *Gatti* case died and that case was then settled.

The Mutual Life Insurance Company expressly limits the "restrictions and provisions applying to the Double Indemnity and Disability Benefits" which are

excepted from its incontestable clause to those set forth "in Sections 1 and 3 respectively" of its policy. The New York Life Insurance Company, in its incontestable clause, does not limit the excepted provisions to those set forth in particular sections of the policy, nor indeed to any part of the provisions and conditions relating to disability and double indemnity benefits, but excepts *all* of them, including the basic promises on the face of its policy, affirmatively creating the obligations to pay disability and double indemnity benefits. The exception in the incontestable clause of The Mutual Life Insurance Company being expressly confined to Sections 1 and 3 of its policy, does not apply to the basic promises of that company to pay disability and double indemnity benefits, because those basic promises are not contained in Sections 1 and 3, on the inside pages of its policy, but appear on the face of the policy.

In the words of this Court, the respondent in the *Gatti* and *Ruhlin* cases "employed different language" from that used by The Mutual Life Insurance Company. Evidently the respondent was one of the companies referred to by this Court which makes "exceptions to the incontestability clause by words more precise than those now under consideration," *i. e.*, in the *Stroehmann* case.

Judge Watson distinguished between the incontestable clauses of The Mutual Life Insurance Company and of the New York Life Insurance Company. It was he who decided the *Stroehmann* case in the District Court, and whose decision there was reinstated by this Court. He was also one of the judges who concurred in the original opinion in the case at bar filed on October 6, 1936, holding that the New York Life Insurance Company's incontestable clause excepted the disability and double indemnity benefits from its operation (R. 25).

The Circuit Court of Appeals for the Fifth Circuit is in accord with the Third Circuit: *Pyramid Life Ins. Co. v. Selkirk,* 80 F. (2d) 553. That case is on all fours with the one at bar and involved an incontestable clause reading as follows: "This policy shall be incontestable after one year from date of issue, except for the non-payment of premiums or violation of its terms as to military or naval service in time of war, and except as to provisions and conditions relating to disability benefits and those granting additional insurance specifically against death by accident, if any."

Holding that the company was entitled to rescission of the disability provisions on account of fraud, notwithstanding that the policy had been issued more than one year, the Circuit Court of Appeals for the Fifth Circuit said (p. 554):

> "The expression, 'provisions and conditions relating to disability benefits,' even if tautological, embraces all matters relating to liability for such benefits; those which create the right to receive them, as well as those which will defeat the right. When the terms 'provisions' and 'conditions' are combined, nothing else relating to liability for disability benefits remains to be referred to, and both are excepted from the operation of this incontestability clause. It might have been briefer to have said, as suggested by appellee, that the policy is incontestable after one year 'except as to liability for disability benefits.' But it would have been no more comprehensive. Moreover, one of the 'provisions' relating to disability benefits is the promise of the insurer to pay them, made in reliance upon the insured's application which forms a part of the policy and in which the false representations are alleged to have been originally made. The 'provision' containing this promise is excluded from the protection of the incontest-

> ability clause and leaves such promise open to rescission for fraud in its procurement."

The Circuit Court of Appeals for the Fifth Circuit also said in that case that the incontestable clause of the Equitable Life Assurance Society was similar to that before it, which is substantially identical with that used by the New York Life Insurance Company, and distinguished the incontestable clause used by The Mutual Life Insurance Company.

The Circuit Court of Appeals for the Sixth Circuit is also in accord with the Courts below: *Connecticut General Life Ins. Co. v. McClellan,* decided February 8, 1938, and not yet reported. That was a suit in equity brought by the insurer to cancel the disability provisions of a policy on the ground of fraud by the insured in the application for the policy. The policy provided that it should be incontestable after it had been in force for two years, except for non-payment of premium and "except as to provisions and conditions relating to benefits in the event of total and permanent disability." There was a motion to dismiss the bill on the ground that the incontestable clause barred the relief sought, the policy having been issued for more than two years. The Circuit Court of Appeals for the Sixth Circuit held that this motion should be overruled and that the case should go to a hearing on its merits. After referring to *Stroehmann v. Mutual Life Ins. Co., supra,* and *Ness v. Mutual Life Ins. Co.,* 70 F. (2d) 59, Judge Moorman for the Court said:

> "The language in the policy here in controversy is entirely different. It is unambiguous, clear, so clear that, in our opinion, to argue the point would be an attempt to overclarify it."

No argument is needed, we believe, to show the similarity between the incontestable clauses of the Con-

necticut General Life Insurance Company and the respondent. The general construction of each is the same; each first excepts therefrom non-payment of premium; and then both proceed with the identical language "except as to provisions and conditions relating to" disability benefits.

The Circuit Court of Appeals for the First Circuit is also in accord with the Courts below. Cancellation of the disability benefits for fraud in the procurement of the policy was granted in *Kaffanges v. New York Life Ins. Co.*, 59 F. (2d) 475. In that case, as here, more than two years had elapsed since the policy was issued, and accordingly no attempt was made to rescind the life feature of the policy. The same form of policy was involved in that case as in the case at bar. The fact that the relief prayed for was decreed demonstrates that the disability and double indemnity benefits may, in the opinion of the Circuit Court of Appeals for the First Circuit, be rescinded while the life feature of the policy is continued in force. The Court in that case discharged the question with which we are now laboring in the following terse language (p. 476):

> "The policy was issued in August, 1926, and contained an incontestable clause as to death benefits, but not as to the disability provisions."

The United States District Court for the District of New Hampshire, is also in accord with the decisions below. In *New York Life Ins. Co. v. Malloy*, that Court had before it an equity suit brought by the insurer to rescind the disability and double indemnity benefits of four policies containing the identical incontestable clause which is now before this Court. Holding that this incontestable clause does not apply to the disability and double indemnity benefits, Judge Morris in his opinion filed on January 27, 1938, and which has not yet been reported,

after quoting from the opinion of this Court in *Stroehmann v. Mutual Life Ins. Co., supra,* said:

> "It should be noted that the language in the Stroehmann case is identical with the language in the Ness case heretofore cited. It is apparent from the above opinion of the Supreme Court that the excepting clause in each policy of insurance must be construed in accordance with its language and the fair meaning expressed and if the language is not ambiguous, the principle that it will be construed most favorably to the insured is not applicable."

After considering the opinion in *New York Life Ins. Co. v. Kaufman,* 78 F. (2d) 398, heavily relied upon by the petitioners, Judge Morris said:

> "I am not prepared to follow the Kaufman case and I hold that the complainant in the case at bar is not precluded by the incontestability clause in the policy from obtaining rescission of the double indemnity and disability clauses for fraud or material misrepresentation practiced by the insured at the inception of the contract."

The Pennsylvania law is in accord with the decisions below: *Guise v. New York Life Ins. Co.,* 127 Pa. Superior Ct. 127, 191 A. 626 (1937). In that case, it was specifically decided that the identical incontestable clause now before this Court does not apply to the disability provisions contained in the policy. That was a suit brought by the insured for disability benefits, and one of the insurer's defenses was that false answers had been made by the plaintiff to questions in the application for one of the policies. The portion of the opinion dealing with the effect of the incontestable clause is as follows (p. 133):

"During the course of the trial counsel for appellee questioned the right of appellant to inquire into 'matters relating to things prior to the issuance of the insurance policies' in view of the 'incontestability clause' in each. The learned trial judge, Davison, P. J., specially presiding, correctly ruled that the incontestability clauses did not apply 'to the provisions and conditions relating to disability * * * benefits.' An examination of the clauses discloses that the disability provisions of the policies are expressly excluded from their operation."

The New York courts have repeatedly ruled upon the precise question now under consideration and have uniformly decided it in accord with the Courts below: *Conn. General Life Ins. Co. v. Brandstein,* 233 App. Div. 723, 249 N. Y. S. 1018; *Chambers v. New York Life Ins. Co.,* 148 Misc. 561, 265 N. Y. S. 217, affirmed in 240 App. Div. 1027, 268 N. Y. S. 994; *Conn. Mutual Life Ins. Co. v. Hirsch,* 240 App. Div. 816, 266 N. Y. S. 950; *Guardian Life Ins. Co. v. Katz,* 243 App. Div. 11, 275 N. Y. S. 743, affirmed in 269 N. Y. 625, 200 N. E. 29; *Mutual Life Ins. Co. v. Union Trust Co.,* 280 N. Y. S. 217. In the *Chambers* case, in which this same insurance company sought to rescind that part of an identical policy which provided for disability and double indemnity benefits, the court, in rejecting the insured's argument that the relief sought by the company was barred by the incontestable clause, said (265 N. Y. S. 217):

"The policies specifically except the incontestability for double indemnity and disability."

Judge Black for the court in that case also said (p. 218):

"It will be observed that the policy in suit specifically shows the charge each year for double indemnity and disability benefits, so that it is not only possible but practicable to terminate the benefits for which

> the plaintiff paid in the event that a final determination shall find that fraud and misrepresentation were practiced upon the defendant."

The highest court of New York State is also in accord with the Courts below with reference to the identical form of policy involved in the instant case: *Steinberg v. New York Life Ins. Co.*, 263 N. Y. 45, 188 N. E. 152. That was an action by the insured for disability benefits. The defense was that the plaintiff had falsely answered questions in the application regarding his prior health. More than two years had elapsed between the issuance of the policies and the bringing of this suit. The Court of Appeals of New York nevertheless held that the defense should have been admitted. The Court of Appeals said (p. 47):

> "The two year incontestability clauses contained in the policies prevent any defense as to the ordinary life insurance provisions in the policies, but do not apply to the disability and double indemnity benefits."

In *Manhattan Life Ins. Co. v. Schwartz*, 274 N. Y. 374, 9 N. E. (2d) 16, and *Equitable Life Assur. Soc. v. Kushman*, 276 N. Y. 178, 11 N. E. (2d) 719, the Court of Appeals of New York reaffirmed its view that an incontestable clause, such as that in our case, does not prevent rescission for fraud of the disability and double indemnity provisions of a policy even after the period designated in the incontestable clause has expired.

A well considered case is *Smith v. Equitable Life Assur. Soc.*, 169 Tenn. 477, 89 S. W. (2d) 165. The Supreme Court of Tennessee there held in accord with the Courts below in the case at bar. The opinion is in part as follows (pp. 482-484):

"The language for construction (condensed by omitting matter not relevant to the issues under consideration) is: 'This policy, except as to the provisions relating to disability * * *, shall be incontestable after,' etc. How can it be said, in the face of this quite definite excepting language, that it was intended to declare the policy to be incontestable as to its provisions for disability? The phrase 'relating to' is the equivalent of pertaining to, having reference to (Webster's New International), terms that are comprehensive of the subject indicated. As we understand the argument made for the insured, it is that the exception should be construed to apply, not to the general obligation, as a whole, to pay disability insurance, but only to the right to deny liability because certain prescribed conditions of liability applicable to claims arising under these heads have not been complied with, such as, under a claim for total and permanent disability, giving of notice and filing of proofs thereof within stipulated periods, or because the disability has resulted from military or naval service, or from self-inflicted injury. It is said that it was to preserve to the society the right to contest touching these matters after one year that the exception was inserted.

"We think it apparent that the confusion which seems to have arisen in this case, and in several of those relied on for the insured, is due to a failure to appreciate the distinction between 'a denial of coverage and a defense of invalidity' which Chief Justice Cardozo, when on the Court of Appeals of New York, so clearly emphasized in his opinion in *Metropolitan Life Ins. Co. v. Conway,* 252 N. Y., 449 169 N. E., 642. In that case he said: 'The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a

period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken.'

"There could be no possible necessity for the insertion of a clause reserving by exception the right to contest a claim for payment based on disability on the ground that the claim did not come within the terms of coverage, that is, the conditions upon and under which the insurance was to be paid, for example, a showing that the disability was total and permanent, and was not self-inflicted. Such rights of defense are never affected by time limitations relating to the execution of the contract, or issuance of the policy, but arise only and may be asserted whenever claims are made under the contract."

The Supreme Court of Tennessee in that case also said (pp. 486-487):

"As illustrating the very distinction which Chief Justice Cardozo emphasizes, and which the South Carolina Court* altogether overlooks, that court sets forth in its opinion items, all clearly of coverage, which it says are 'the provisions relating to disability' intended to be excepted from contestability by the use of the language employed. Says that court:

" 'It will be seen from a study of the disability clause that there are many provisions which have to be complied with before the insured claiming disability can be paid thereunder.

" '(1) The insured must show that he cannot

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* In *Kiriakides v. Equitable Life Assur. Soc.*, 174 S. C. 140, 177 S. E. 40.

engage in any work for compensation of financial value.

"'(2) The insured must show that the disability will continue for a certain period unless it involves the loss of sight or certain other injuries enumerated therein.

"'(3) The company will not pay, in any event, any disability resulting directly or indirectly from military or naval service in time of war.

"'(4) The due proof must be made within one year after default in payment of premium and must show that the insured became totally disabled as provided in the policy.

"'(5) If the insured has not reached the age of 60 years, the society will:

"'(a) Waive all premiums;

"'(b) Pay to the insured a monthly disability income.'

"We think it too plain for argument that every one of these provisions, or conditions, are with respect to matters as to which the exception as to incontestability could have no sort of reference. Every one of the items enumerated relate to matters of coverage, conditions of the contract to pay which the company could, of course, rely upon consistently with recognition of the validity of the contract of insurance and without respect to any limitation upon contestability. See *Scales v. Jefferson Standard Life Insurance Co.*, 155 Tenn., 412, 295 S. W., 58, 55 A. L. R., 537, and cases therein reviewed, in which the distinction is made clear between the right to contest for invalidity and the right to deny liability for violation of, or noncompliance with, the conditions of the risk assumed."

The precise question has also been decided in accord with the Courts below by the Supreme Court of Mississippi: *New York Life Ins. Co. v. Gresham,* 170 Miss. 211, 154 So. 547. The same form of policy was involved there as here. The action was brought by the insured for disability benefits after the contestable period had expired. The defense was fraud in the issuance of the policy. The lower court held that this defense was barred and accordingly directed a verdict for the plaintiff for the full amount asked by her. The Supreme Court of Mississippi reversed, holding that this defense was not barred and saying (p. 222):

> "The provisions and conditions relating to the disability and double indemnity benefits are expressly excepted from the incontestable clause of the policy, which reads as follows: 'This policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to disability and double indemnity benefits.'"

The question has also been recently decided by the Supreme Court of Arizona in *Greber v. Equitable Life Assurance Society,* 43 Ariz. 1, 28 P. (2d) 817. That was an action brought by the insured to recover disability benefits. The suit was not brought until after the period referred to in the incontestable clause had expired. The defense was that the insured had falsely answered questions in the application regarding his health. The insured contended that this defense was barred under the incontestable clause and the Arizona statutes. The incontestable clause in that case read as follows:

> "This policy, except as to the provisions relating to Disability and Double Indemnity, shall be incontestable after it has been in force during the lifetime of the Insured for a period of one year from

its date of issue provided premiums have been duly paid."

The Supreme Court of Arizona affirmed a judgment in favor of the defendant, the insurer, holding that the defense of fraud was not barred.

The Supreme Court of Washington is also in accord with the Courts below: *Millis v. Continental Life Ins. Co.*, 162 Wash. 555, 298 Pac. 739; *Paulson v. Montana Life Ins. Co.*, 181 Wash. 526, 43 P. (2d) 971. In the *Paulson* case, the Supreme Court of Washington held that the disability and double indemnity provisions remained contestable though the policy had been issued over five years and accordingly decided that, the policy having been procured by fraud, the "incidental features" for disability and double indemnity benefits should be cancelled. In the *Millis* case the Supreme Court of Washington said (p. 564):

> "The incontestable clause of the policy in the case at bar is not applicable to total and permanent disability benefits. The contract so provides. The parties stipulated in their contract that it
>
> '* * * shall be incontestable after one year from date of issue if the premiums are duly paid, except as provided under the provisions or conditions relating to benefits in the event of total and permanent disability.'"

A somewhat similar question was raised and decided in favor of the insurance company in *All States Life Ins. Co. v. Jaudon*, 228 Ala. 672, 154 So. 798. That case involved a statute rather than a clause in the policy itself. It was held that the statute did not apply to the provisions for disability benefits in a life policy. In an annotation to that case in 94 A. L. R. 1133, it is said (p. 1134):

"And provisions in terms exempting provisions for disability benefits from the operation of incontestable clauses have, in most instances, been held to remove entirely such provisions from the operation of such clauses."

A well reasoned case is *Guardian Life Ins. Co. v. Barry,* 10 N. E. (2d) 614, decided by the Supreme Court of Indiana on October 26, 1937. That was an action brought by the insured for disability benefits more than two years after the policy had been issued, and the defense was false answers in the original application. The policy contained an incontestable clause reading as follows: "This policy shall be incontestable after it has been in force during the lifetime of the Insured for a period of one year from its date of issue, except for nonpayment of premium, and except as to provisions and conditions relating to benefits in the event of total and permanent disability and those granting additional insurance specifically against death from accident, * * * " It was held that the incontestable clause did not bar the defense of fraud in the application. The opinion is in part as follows (p. 619):

"In the policies in the Ness and Stroehmann Cases there is a basis in the limited language of the exception for a doubt as to whether there was an intention to reserve the right to attack the policy for fraud or misrepresentation. There is no such basis here, and, since the exception deals with the right to contest the policy, and since the word 'contest' should be given its usual and ordinary meaning where there is nothing to indicate that a different meaning was intended, it must be concluded that it was intended to refer to actions which would effect a rescission of the contract, and not to defenses which would merely seek a construction of the con-

tract with a view of determining the nature and extent of the risks covered."

Other cases in accord with the decisions below are: *New York Life Ins. Co. v. Davis,* 5 F. Supp. 316, 319; *Penn Mutual Life Ins. Co. v. Joseph,* 5 F. Supp. 1003, 1004; *Mutual Life Ins. Co. v. McConnell,* 20 D. & C. 250, 251 (Pa.); *Penn Mutual Life Ins. Co. v. Hartle,* 165 Md. 120, 124, 166 A. 614; and *Schaedler v. New York Life Ins. Co.,* 276 N. W. 235 (Minn.).

Passing to the cases cited by the petitioners, there is the decision of the Fourth Circuit in *Ness v. Mutual Life Ins. Co.,* 70 F. (2d) 59. The incontestable clause before the court in that case is materially different from that before this Court. The exception in the incontestable clause in that case read as follows:

"except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively."

There was a promise to pay disability and double indemnity benefits on the face of the policy. Sections 1 and 3 were specifically so identified in the policy and contained detailed terms relating to disability and double indemnity benefits. It will thus be seen that the exception to the incontestability clause in the *Ness* case was specifically restricted to what was contained in the sections designated 1 and 3. The court therefore held that the exception in the incontestable clause was specifically withdrawn from the covenants to pay disability and double indemnity benefits not contained in sections 1 and 3. To this effect the court in that case said (p. 61):

"The exception which we are considering was clearly intended to except certain defenses from the operation of that clause; and, equally clearly, the defenses so excepted were those enumerated in the sections

to which specific reference was made, *i. e.*, sections 1 and 3."

In the case at bar, on the contrary, the second exception to the incontestable clause is not limited to any part of the provisions and conditions relating to disability and double indemnity benefits. The language of the exception in the case at bar is unlimited and therefore embraces all of the provisions and conditions relating to disability and double indemnity benefits wherever found in the policy. The *Ness* case involved the same incontestable clause as *Stroehmann v. Mutual Life Ins. Co., supra,* and is, therefore, subject to the same distinction which this Court in the latter case pointed out between it and the very case now before this Court.

In *Equitable Life Assur. Soc. v. Deem,* 91 F. (2d) 569, the Circuit Court of Appeals for the Fourth Circuit itself decided that the incontestable clause then before it did not apply to the disability benefits provided by a policy, distinguishing its prior decision in the *Ness* case. The opinion contains an enlightening historical review of the incontestable clause. When reading that it should be noted that the respondent in the case at bar is also a New York corporation (R. 2). After stating that the question at issue was whether the wording of the incontestable clause disclosed a purpose to except the disability benefits, the court said what we submit is applicable to the case at bar, as follows (p. 573):

> "In our opinion it does. This is the effect of the words used in their plain meaning. There is no ambiguity or uncertainty in the phrase. The wording is naturally that which comes to mind to express the thought intended. It is, in abbreviated form, in the very words used in the statute, and as expressed in the Supreme Court opinion, supra. The exception, 'as to the provisions relating to Disability

and Double Indemnity' is comprehensive in scope, applying to all such provisions in the policy. Smith v. Equitable Life Assur. Soc., 169 Tenn. 477, 89 S. W. (2d) 165. And the exception directly relates to the 'policy,' that is it excepts the part of the policy which *grants* the disability benefits as an obligation of the company. The phrase does not grammatically modify the word 'incontestable' and thus merely affect the causes of contest, but relates to the whole subject matter of the policy insofar as it covers liability of the company for disability benefits. The policy as a whole includes three separate kinds of insurance, which constitute in reality three major promises of insurance protection, life, accident and disability. It seems entirely clear that the insurer intended to avail itself of the statutory authority to make the incontestable clause inapplicable to the latter two of these risks, and thus excepted from the clause those provisions of the policy relating to them."

The petitioners also rely heavily upon *Mutual Life Ins. Co. v. Markowitz,* 78 F. (2d) 396 and *New York Life Ins. Co. v. Kaufman, supra,* decided simultaneously by the Circuit Court of Appeals for the Ninth Circuit. The fact that a certiorari was denied in those cases is not to be construed as any expression by this Court upon the merits of the question involved, as this Court has repeatedly declared: *Hamilton-Brown Shoe Co. v. Wolf Bros.,* 240 U. S. 251, 258; *U. S. v. Carver,* 260 U. S. 482, 490.

Mutual Life Ins. Co. v. Markowitz, supra, involved the same incontestable clause as *Ness v. Mutual Life Ins. Co., supra,* and *Stroehmann v. Mutual Life Ins. Co., supra,* which we have already seen is materially different from that now before this Court in that the excep-

tion to the incontestable clause there involved was expressly limited to only a part of the provisions applying to double indemnity and disability benefits. That this distinction was a material factor in the court's decision in the *Markowitz* case appears from the following excerpt from its opinion (pp. 397-398):

> "The clause, however, excepts only the restrictions and provisions applying to disability benefits 'as provided in Section * * * 3' of the policy.
>
> The restrictions and provisions of section 3 are the same as those in the policy considered in the Ness Case. We are in agreement with the analysis of the opinion in that case leading to the conclusion that there is no ambiguity in the clause; that it clearly provides that the company saved its right to contest only in matters arising from the restrictions and provisions specifically set forth in section 3; and that the disability insurance is incontestable as to causes growing out of acts of the insured in its procurement."

The court in the *Markowitz* case further emphasizes the difference between the incontestability clause before it and the one now before this Court by indicating that the insurance company would have prevailed if its incontestability clause had read: "The insurance against death in this Policy is incontestable, except for the nonpayment of premiums and for the restrictions and provisions applying to double indemnity, after one year from its date of issue." That is substantially the wording of the exception before this Court. The exception before this Court reads: "except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits." Under the decision of the Ninth Circuit in the *Markowitz* case, therefore, the decisions of the Courts below should be affirmed.

In the *Kaufman* case it seems doubtful whether the court was required to pass upon the incontestability clause, for it said (p. 401):

> "Unlike the case of *Mutual Life Ins. Co. v. Markowitz* (C. C. A.) 78 F. (2d) 396, argued with this case and to-day decided, the common-law cause of the bill here is for but $900, and, since not transferable to the law side, the court has no occasion to determine whether transfer is refusable because the bill shows no cause of action at all."

The court in the *Kaufman* case relied somewhat upon a "double division of the whole contract" into policy and application. In this connection, the court suggested that the incontestable clause should have been worded to read (p. 404): "This *entire contract* shall be incontestable * * * except as to provisions and conditions relating to Disability Benefits". If the application is not part of the policy, then the incontestable clause should not apply to the application at all, in which event fraud in the answers in the application could be raised as a defense at any time.

The court in the *Kaufman* case also suggests that the incontestable clause, if intended to mean what the company contended, should read as follows (p. 402): "The *life* insurance of this policy is incontestable after two years, except for non-payment of premiums." Such a "simple statement" would clearly not suffice, however, because the petitioners argued below that double indemnity for accidental death is "life insurance" and there is authority to that effect: *N. Y. Life Ins. Co. v. Rositzky*, 45 F. (2d) 758. Consequently, if the "simple statement" suggested in the *Kaufman* case were used it would certainly be contended by others that there was no exception to take the double indemnity provisions

out of the incontestable clause. It is respectfully submitted that the *Kaufman* case should not be followed in the instant case.

So far as *Thompson v. New York Life Ins. Co.*, 9 F. Supp. 248, is concerned, the decision of the lower court was not concurred in by the Circuit Court of Appeals for the Tenth Circuit. The lower court based its decision wholly upon the contention urged by our opponents. The Circuit Court, while it affirmed, said (78 F. (2d) 946, 947):

> "Affirming the decree below on the first ground, as we do, is not to be understood as an affirmance on the ground ruled below; we leave the question open until it is proper for us to decide it."

If the Circuit Court of Appeals for the Tenth Circuit had been in accord with Judge Kennamer, the natural thing for it to have done would have been to have affirmed on the one and only reason upon which he based his decision. Evidently the Circuit Court of Appeals was not prepared to agree with the lower court's opinion in the *Thompson* case.

The petitioners quote at length from *New York Life Ins. Co. v. Thomas*, 27 D. & C. 215, a decision by a common pleas court. That case is overruled by the later case of *Guise v. New York Life Ins. Co., supra*, a decision by an appellate court of Pennsylvania.

Mutual Life Ins. Co. v. Margolis, 11 Cal. App. (2d) 382, 53 P. (2d) 1017, also cited by the petitioners, involved the same incontestable clause as the *Stroehmann, Ness* and *Markowitz* cases, already discussed, and is, therefore, subject to the same distinction.

New York Life Ins. Co. v. Truesdale, 79 F. (2d) 481 (C. C. A. 4); *New York Life Ins. Co. v. Yerys*, 80 F. (2d)

264 (C. C. A. 4) and *Horwitz v. New York Life Ins. Co.*, 80 F. (2d) 295 (C. C. A. 9), are simply cases in which the Circuit Courts for the Fourth and Ninth Circuits followed their prior decisions in *Ness v. Mutual Life Ins. Co., supra; Mutual Life Ins. Co. v. Markowitz, supra,* and *New York Life Ins. Co. v. Kaufman, supra,* and are not well considered cases.

Wilson v. Equitable Life Ins. Co., 220 Iowa 321, 262 N. W. 525, also listed by the petitioners as supporting their contention, involved an incontestable clause reading as follows:

> "This policy shall be incontestable after one year from the date of issue, except for non-payment of premium and except as provided in paragraphs 14 and 15 relating to Disability benefits."

Paragraphs 14 and 15 of the policy involved in the *Wilson* case corresponded with Sections 1 and 3 of The Mutual Life Insurance Company policy, and as the court noted in its opinion (220 Iowa 327), "All the provisions with reference to the total and permanent disability benefits are not covered in paragraphs 14 and 15 of the policy." The *Wilson* case is, therefore, subject to the same distinction as the *Stroehmann, Ness, Markowitz* and *Margolis* cases, *supra.* The opinion in the *Wilson* case shows that the court based its decision upon the proposition that the exception was limited to the contents of paragraphs 14 and 15 of the policy, and did not embrace all of the provisions of the policy regarding disability benefits. One sentence from the opinion is as follows (p. 325): (Italics by the court)

> "Analyzing this sentence (the incontestable clause), the policy was made incontestable except *'as provided in paragraphs 14 and 15.'*"

From this review of the cases, both pro and con, in which the precise question under consideration has been considered, it is clear that the numerical weight of authority is in accord with the Courts below. Whatever may be said concerning the correctness of the few cases which reached a contrary decision, in the light of their own facts, it is submitted that so far as the case at bar is concerned the numerical weight of authority also is the line of precedents which should be followed. Logic and principle demonstrate that the view of the numerical weight of authority is the correct one to be applied to the case at bar. This is also the conclusion which, we submit, is reached by an independent analysis and consideration of the question involved without reference to the cases in which the precise question has been decided. The other policyholders of this mutual company should not be denied the opportunity to prove whether a fraud was committed upon them in the obtaining of the disability and double indemnity insurance in question.

The decisions of the District Court and of the Circuit Court of Appeals should, therefore, be affirmed.

Respectfully submitted,

LOUIS H. COOKE,
WILLIAM H. ECKERT,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 596.—October Term, 1937.

John G. Ruhlin et al., Petitioners, *vs.* New York Life Insurance Company.	On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 2, 1938.]

Mr. Justice Reed delivered the opinion of the Court.

On February 14, 1935, the New York Life Insurance Company, respondent here, filed its bill of complaint in the District Court for Western Pennsylvania to rescind, because of certain misrepresentations, the disability and double indemnity provisions in five policies issued on the life of defendant John G. Ruhlin, and made in favor of the other defendants as beneficiaries.

The bill alleged that the plaintiff is a mutual life insurance company incorporated under the laws of the State of New York and lawfully engaged in business in Pittsburgh, Pa.; that the defendants are temporarily living in Pennsylvania, though plaintiff does not know where their legal residence is; that on December 1, 1928, plaintiff wrote two policies of life insurance on the life of John G. Ruhlin, in the face amounts of $10,000 and $5,000; that on July 7, 1930, it wrote three additional, similar policies in the face amount of $4,000 each; that certain questions in the applications were answered falsely and fraudulently by the insured; that on November 1, 1934, John G. Ruhlin presented a claim for total and permanent disability benefits under each of the five policies. The Company tendered into court the sum of $1,045.42, the aggregate amount of premiums paid for disability and double indemnity benefits, and prayed that the disability and double indemnity provisions be rescinded, and for other relief not material here.

The defendants filed a motion to dismiss the complaint on the ground that the policies had become incontestable, since the suit was brought more than two years after the date of each policy

involved. The "incontestability clause" of each of the policies reads as follows:

"Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

The District Court overruled the motion to dismiss. The Circuit Court of Appeals affirmed the order, holding that, in view of their express terms, the incontestability clauses had no application to liability for disability and double indemnity benefits. It recognized that its decision was contrary to that reached by the Circuit Court of Appeals for the Ninth Circuit, (*New York Life Insurance Company* v. *Kaufman*, 78 F. (2d) 398), and by the Circuit Court of Appeals for the Fourth Circuit, (*New York Life Insurance Company* v. *Truesdale*, 79 F. (2d) 481), which had held that the exception in the incontestability clause related only to provisions and conditions actually set forth in the policy itself, compare *Stroehmann* v. *Mutual Life Insurance Co.*, 300 U. S. 435, and that fraud was not mentioned in any of those provisions. Ruhlin petitioned for certiorari, asserting the conflict of circuits. The Company filed a memorandum admitting the conflict, and raising no objection to the granting of the writ. Because of the conflict of circuits, the Court granted certiorari. — U. S. —.

It was stated in *Carpenter* v. *Providence Washington Insurance Co.*, 16 Pet. 495, 511, that questions concerning the proper construction of contracts of insurance are "questions of general commercial law," and that state decisions on the subject, though entitled to great respect, "cannot conclude the judgment of this court." A limitation was put on this doctrine in *Mutual Life Ins. Co.* v. *Johnson*, 293 U. S. 335, 340. Putting aside all questions of power, the Court interpreted a specific provision of an insurance contract in accordance with the decision of the highest court of the State of Virginia, where delivery was made. "All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so 'balanced with doubt,' we accept as our guide the law declared by the state where the contract had its being." The decision in *Erie Railroad Co.* v. *Tompkins*, — U. S. —, No. 367, decided April 25, 1938, goes further, and settles the question of power. The subject

is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity. Compare *Mason* v. *United States,* 260 U. S. 545, 557, 558.

Had *Erie Railroad* v. *Tompkins* been announced at some prior date the course of this case might have been different. This Court might not have issued a writ of certiorari. Rule 38(5) of the Supreme Court Rules indicates that this Court will consider, as a reason for granting a writ of certiorari, the fact that "a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter." Since jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given to this Court in order "to secure uniformity of decision," *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163, a showing of a conflict of circuits on a matter concerning which the federal courts had never denied their right to independent judgment prompted this Court to grant the writ. E. g., *Aschenbrenner* v. *United States Fid. & G. Co.,* 292 U. S. 80, 82; *Stroehmann* v. *Mutual Life Ins. Co.,* 300 U. S. 435, 440. As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions." No such showing was attempted by the petition. Nor was it contended that the decision below was "probably untenable" and therefore probably in conflict with the state law as yet unannounced by the highest court of the State.

No decision at the present time could reconcile any "conflict of circuits," or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law. However, we shall not dismiss the writ of certiorari as improvidently granted. In view of the fact that the question in the case was regarded below, both by the courts and by counsel, as one of "general" or "federal" law, the interest of justice requires that the judgment be vacated and the cause remanded for

the enforcement of the applicable principles of state law. See *Villa* v. *Van Schaick*, 299 U. S. 152, 155-156; *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267-268; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21.

It is true that the Circuit Court of Appeals, in rendering judgment on reargument, said (see 93 F. (2d) 416, 417):

Furthermore, both the Court of Appeals of New York and the Supreme Court of Pennsylvania have held that the incontestability clause here involved clearly excepts the double indemnity and disability provisions from its operation. Steinberg *v.* New York Life Ins. Co., 263 N. Y. 45, 188 N. E. 15; Manhattan Life Insurance Co. *v.* Schwartz, 9 N. E. (2) 16; Guise *v.* New York Life Ins. Co., 191 Atl. 626. We have read the recent opinion of the Supreme Court of California in the case of Coodley *v.* New York Life Insurance Co., — Cal. —, and the opinion of Judge Coughlin in the case of New York Life Insurance Co. *v.* Thomas, 27 D. & C. 215, but are not persuaded that the learned District Judge erred. Since the company is domiciled in New York and the insured lives in Pennsylvania and "all that is here for our consideration is the meaning, the tacit implications, of a particular set of words," "for the sake of harmony and to avoid confusion" we shall follow the decision of those courts and hold that the insurance company is not barred by the incontestability clause from rescinding the double indemnity and disability provisions. Mutual Life Ins. Co. *v.* Johnson, 293 U. S. 340; Trainor *v.* Aetna Casualty Company, 290 U. S. 47, 54.

It is not necessary here to consider whether, in the determination of the substantive Pennsylvania rule, the Circuit Court of Appeals was correct in declining to follow the *nisi prius Thomas* case, directly in point, and in applying the *Guise* case, which was decided by an intermediate appellate court (127 Pa. Super. 127), and not the supreme court of the state as the court below stated, and which involved a defense of coverage, available even under an ordinary incontestability clause as the opinion in the *Guise* case clearly states (127 Pa. Super. at 133).[1]

A different case might have been presented, and the facts and authorities developed in another fashion, if the parties had had in mind from the first the rule the Pennsylvania court would have applied.

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[1] The Superior Court said (127 Pa. Super. at 133):

"An examination of the clauses discloses that the disability provisions of the policies are expressly excluded from their operation. Even if that exemption had not been inserted, the clauses would not have prevented the interposition of the defense here set up. Mayer *v.* Prudential Life Insurance Company of America, 121 Pa. Superior Ct. 475, 184 A. 267."

The pleadings might have shown in what place the policy was delivered,[2] and perhaps other facts attending the making of the insurance contract. It may be noted that petitioner's brief asserts, without record reference, that the applications for the first two policies were made in Pennsylvania, and the application for the remaining three policies were made in Ohio. But as the record stands, we know only that at the time of bringing suit the respondent Company was incorporated in New York, and lawfully engaged in business in Pittsburgh, and that the defendants were then temporarily living in Pennsylvania.

Application of the "State law" to the present case, or any other controversy controlled by *Erie R. Co.* v. *Tompkins,* does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of "general" law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of "local" law.

The judgment is vacated and the cause remanded to the District Court, for further proceedings in conformity with this opinion, with directions to permit such amendments of the pleadings as may be necessary for that purpose.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[2] Under the general doctrine the interpretation of an insurance contract depends on the law of the place where the policy is delivered. Mutual L. Ins. Co. *v.* Johnson, 293 U. S. at 339. We do not now determine which principle must be enforced if the Pennsylvania courts follow a different conflict of laws rule.